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Sanders v. Ahlstrom : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES LEE SANDERS, Plaintiff and Appellant, vs. KRISTIN A. AHLSTROM, Defendant and Respondent	860088-CA Civil No. 20375

RESPONDENT'S BRIEF

Appeal from Jury Verdict and Order Denying New Trial
in Salt Lake County, Utah
Leonard H. Russon, Judge

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STATEMENT OF ISSUES

The jury unanimously found that plaintiff/appellant James Sanders (plaintiff or Sanders) did not prove by a preponderance of the evidence that his injuries, if any, were proximately caused by the automobile accident between him and defendant/respondant, Kristin Ahlstrom (defendant or Ahlstrom). The trial court entered judgment on the jury's special verdict and denied plaintiff's motion for new trial. The issue is whether or not the jury verdict should be set aside and whether or not the judgment of the trial court should be vacated and the case remanded.

STATEMENT OF THE CASE

This personal injury action arose from an automobile accident. The case was tried by jury before the Honorable Leonard H. Russon, Judge in the Third Judicial District Court. The jury found that defendant was negligent and that her negligence caused the accident. However, the jury unanimously answered interrogatory 3 on the Special Verdict as follows:

> 3. If you answered questions 1 and 2 "Yes", then answer this question: Did James Lee Sanders prove by a preponderance of the evidence that his injuries, if any, were proximately caused by the accident in question?
>
> ANSWER: No.

A copy of the signed special verdict is appended hereto as Appendix 1.

The trial court entered judgment on the special verdict

in favor of defendant and against plaintiff, no cause of action. (Appendix 2 herein) Plaintiff made a motion for new trial which was briefed, argued and then denied by the court. (Appendix 3 herein)

STATEMENT OF FACTS

Because plaintiff's Statement of Facts is incomplete, misleading, conclusionary and in many instances without proper support in the record, it is necessary for defendant to discuss in some detail the facts of this case.

On September 25, 1982, plaintiff was driving an automobile in which several other members of his family were passengers. (R. 351) At the base of a hill he stopped for a red light. (R. 25) His automobile was last in line behind several other cars. (R. 25) The roads were very wet and very slick. (R. 648, 649)

Shortly after plaintiff stopped, defendant driving a car in which her four children were passengers crested the hill, saw the red light and line of cars behind it and applied her brakes. (R. 648) Defendant's car slid on the wet roads, did not slow as quickly as it would have under normal conditions, and collided with the rear of plaintiff's vehicle. (R. 649) Plaintiff testified that he was stopped within a car length of the car in front of him and that the impact knocked his car forward two or three feet. (R. 429, 513) The impact did not push plaintiff's car into the car in front of it.

Damage to plaintiff and defendant's vehicles was minor as shown by the photographs taken of the vehicles shortly after the collision. (Exhibits 2-P, 30-D) The investigating officer estimated the impact speed at 15 miles per hour. (R. 625) David Lord, an accident reconstructionist called by plaintiff, agreed with the investigating officer's assessment of impact speed. (R. 387) However, Mr. Lord admitted that assuming an impact of 15 miles an hour and further assuming that plaintiff's foot remained firmly on the brake after impact, plaintiff's car would have been pushed forward a full 18 feet from the point of impact until it came to rest. (R. 415, 416)

After the accident while plaintiff's son directed traffic, defendant had some conversations at the scene of the accident which she related as follows:

> A. Right after the accident, I quickly made sure all of my children wre okay and they all were. I got out of my car. I went down and went to the passenger side of Mr. Sanders car to ask them if they were all right. The baby was crying a lot and I was concerned maybe he was hurt and I asked the mother several times. I said, "Is the baby okay?" And she said, "Yes, he is fine. It just scared him." I asked her that several times. She seemed to indicate everybody was all right.
>
> Q. After that occurred, did you have any conversations with Mr. Sanders?
>
> A. Yes.
>
> Q. Will you relate those conversations, please?
>
> A. He told me that he thought he might have a whiplash because he had had one once before. (R. 651, 652)

At the scene of the accident, Todd Ahlstrom, defendant's oldest son, heard his mother state that plaintiff told her that he (plaintiff) had experienced a prior whiplash. (R. 725) A few minutes after the accident, defendant drove to her mother's house where she related the conversation she had with plaintiff at the scene when plaintiff admitted he had experienced a prior whiplash. (R. 653) The investigating officer, Jerry Peterson, had a memory of a statement being made by someone at the intersection in question following an accident to the effect, "I had a prior whiplash." (R. 626, 627)

Contrary to the above testimony, plaintiff denied telling defendant at the scene that he had experienced a prior whiplash. (R. 30) However, he admitted that he was involved in two rearend collisions before September 25, 1982, but he failed to give much detail regarding these accidents. He said he could not recall exactly when the accidents occurred except that both of them occurred during the summer of 1982, nor could he recall who the involved parties were. (R. 510)

Regarding the rearend accident immediately preceding the September 25, 1982 accident between Sanders and Ahlstrom, Sanders admitted that after this prior accident occurred, his neck was sore, stiff and hurt for two, three or four days. (R. 435, 436)

Plaintiff was involved in a subsequent accident in July of 1983, when a car which was speeding, smashed into the side of a Fiat vehicle in which plaintiff was riding as a passenger. (R. 490-492) Dr. Goka testified plaintiff was injured in this acci-

dent. (R. 587, 592, 597) When pressed on cross-examination, plaintiff admitted he was injured "to a degree." (R. 491) Plaintiff's wife admitted he "was hurting." (R. 619)

After the September 25, 1982 accident was investigated by Officer Peterson, plaintiff and his family continued on with their family outing. They went to the Stuffed Noodle Restaurant, had lunch together and then returned home. (R. 485)

Plaintiff did not see a doctor immediately. Plaintiff testified that his first medical treatment was in the form of therapy from Burt Kidman who plaintiff identified as a chiropractor, osteopath and masseuse. (R. 485) Plaintiff testified that he had seen Mr. Kidman repeatedly in the past for back problems including kinks in his back and neck. (R. 485, 486) According to plaintiff, after his initial visit with Mr. Kidman on September 27, 1985, he saw Kidman several times thereafter. However, plaintiff did not call Mr. Kidman to testify nor did he introduce as exhibits any records which may have been maintained by Kidman.

Plaintiff testified that after undergoing massage treatments at the hands of Burt Kidman, he was seen by his brother-in-law, Dr. Evans, then a radiologist, a Dr. Winters, who took some x-rays and finally Dr. Rich, a neurologist. (R. 442) Plaintiff chose not to call Dr. Evans, Dr. Winters and Dr. Rich and chose not to introduce any of their medical records. However, Dr. Barbuto and Dr. Spencer reviewed records from these doctors which assisted them in formulating their opinion that plaintiff was not

injured. (R. 208-210, 756, 767-768) The x-rays shows some arthritic changes to the spine but were otherwise normal. (R. 752, 753) The myelogram showed no trauma induced abnormalities. (R. 753)

On a referral from Dr. Rich, plaintiff saw Dr. John Barbuto, a Board certified neurologist. (R. 702-704) Plaintiff saw Dr. Barbuto on February 23, 1983, and then again on March 8, 1983 (R. 662), less than five months after the accident with defendant occurred and certainly not more than six months as plaintiff in his brief claims.

Dr. Barbuto conducted a neurological examination of plaintiff which proved essentially normal. (R. 672) Dr. Barbuto elaborated regarding his findings by stating:

> A. Let's look at the data that I had. At that point, I didn't really have any significant data for a serious injury. His exam looked fine. Some number of things tend to conclude that. Initially, he didn't even go to a doctor, he went to a masseuse. If he was majorly injured, that probably would not have been his course. So, I didn't have any good data to suggest that there was a major injury going on initially.
>
> So, I think with regard to deciding if the injury has healed, we have to first establish if there was indeed a major injury. If we say, "minor forms of injury", which the doctor can't document, many people go out and spring fingers or get something or other that the doctor can't see, that happens but those things tend to be shortlived. Could that have been there and could that have healed, the answer is probably yes. Is it possible? It is a minor thing happening? It is always possible. I would presume that

would have healed. As I said, I saw no evidence of a serious process and the course of things did not suggest that that reflected an underlying serious process which would be expected to be ongoing.

Q. Well, so what, in your opinion, could account for this prolonged symptoms that Mr. Sanders was complaining?

A. One of the things I see a lot now days is a very, very complicated process which is called "stress physiology". It is a very real process.

Dr. Barbuto then explained "stress physiology" to the jury and related it to Sanders' situation:

A. Let's start off with a couple of simple examples. Everybody I think is used to thinking in terms of a person gets under stress and they get an ulcer. Stress causes some change and a person get a hole in their stomach, nobody is questioning that there is something there. If somebody says they have pain in there, no one questions that they have pain. High blood pressure, it is very well written up in Ladies' Home Journal and everything else about stress causing high blood pressure and I am sure also people have read about what is called the "Type A Personality." The real go-getter, often executives or aggressive kinds of people who get higher incidents of heart attacks. So what happens if there is now this increasing understanding that stress does things to our bodies.

* * *

All right, well, I see people who now get symptoms on that basis where the major cause of their symptoms, over the long haul, is that kind of process. We see a lot of people with tension headaches. I will tell you more about that later. Lots of people without an abnormal pain problem and back pain problems. Certainly the ulcer or the colitis, the palpatations or

shortness of breath, excessive tiredness, wide movement strain or difficulty sleeping, ringing in the ears or blurry vision.

Q. Doctor, are those symptoms, as you described them, are they in your experience caused by the stress?

A. Yeah, that is what we see. That is what the patient tells us.

* * *

Q. What I want to know, doctor, insofar -- let's bring it back to Mr. Sanders. Now, is one thing then that you have testified that could account for his -- this prolonged symptom is some sort of stress or anxiety?

A. Yes, physiology would easily account for the kind of symptoms he has and also explain a number of things about how the symptoms have progressed.

Q. Would things like marital problems, could that create that kind or problem?

A. Stress is different things for different people. It can be jobs or marital or some other very personal issue. A lot of times, we don't know because people won't tell us. A lot of times we don't know.

Q. Financial difficulty?

A. Sure.

Q. Wife being laid off work?

A. All kinds of things. there are other possibilities. (R. 672-675)

Dr. Barbuto stated clearly that Sanders' perceived symptoms were likely a result of secondary gain and stresses. He reiterated that stresses without any trauma whatsoever could

easily cause the kind of symptoms of which plaintiff complained. (R. 684, 690)

Dr. Barbuto summarized his opinions by stating:

> Q. (By Mr. Burton) Doctor Barbuto, focusing in on Mr. Sanders, do you have an opinion, with a reasonable degree of medical certainty, whether or not the accident that Mr. Sanders was involved in on September 25, 1982 was the cause of the symptoms that he related to you when you saw him in February and March of '83.
>
> A. I think the answer is no. I don't think that the data fits very well with that conclusion. It fits very well with an alternative conclusion which is stress physiology, which I see all the time.
>
> Q. Do you have an opinion whether the accident caused stress and anxiety in Mr. Sanders and whether that anxiety continued and that was sufficient to cause the symptoms of which he complained in February and March of '83?
>
> A. Again, I can give you a long discussion and point out why I would say what I am going to say. The answer is, no, I don't think that fits with the data. (R. 686, 687)

Dr. Barbuto then explained why he reached the conclusions which he did:

> A. First of all, if we ask the question, and this is a good question, does an accident produce the stress that then produces the person's symptoms, reasonable question, if that is the case there are certain things we would expect to see. We would expect to see that, for instance, the stress would be present as a manifestation of the accident, would not be dependent on such things as the social circumstances of the accident, that is to say, who is at fault. It would have to be a phenomenon from the trauma itself. As I

pointed out, that isn't what we observed. It doesn't appear that one can argue that stress would be a derivative of the mechanics of the accident and that would account for the person's symptoms. Secondly, if we assume or again a reasonable assumption, that the worse the accident, the more the stress. Somebody comes into an emergency room with broken bones going every different direction and a ruptured liver, we have to assume that person is under terrible stress, yet they don't get chronic pain syndrome. When we have people who have major trauma, broken bones going very way, we don't see this. . .

The other function that would be expected is that if it was purely related to the trauma of the accident, that person's symptoms would clearly correspond to the accident and would take a certain pattern. And they often don't. We often use these kinds of things coming on weeks or months later, as opposed to coming on immediately or we see people continue to worsen rather than getting better. Many other kinds of things that just don't fit very well with the conclusion that, yes, they have an accident and that generates the stress and that generates the symptoms. There is a lot of data that supports that, and I can go on and on, but anyway there are a lot of other things that we see that refute that conclusion. (R. 687-689)

Further elaborating on the role of stress and tension in producing the kind of symptoms of which plaintiff complained, Dr. Barbuto testified:

Q. Doctor, the kinds of symptoms concerning which Mr. Sanders complains, headaches, tinnitis or ringing in the ear, neck pain and shoulder pain, do you see those kinds of symptoms more frequently as a result of stress and tension than, say, other kinds of symptoms?

A. I see at least one or two new patients a day with tension headache

> syndrome. They have these same kinds of things. They get a symptom complex. They may get one or more of the symptoms, headache, back pain, arm numbness, leg numbness, ringing in the ear, vision blurry, tiredness, difficulty sleeping, passing out spells. I see that combination in some form every day. (R. 690, 691)

The doctor summarized by stating he saw no evidence that Sanders was injured or that his perceived symptoms were caused by the accident (R. 672-673, 689)

Plaintiff built his case around a "fibrositis" diagnosis. However, plaintiff's own treating physician, Dr. Goka, testified that fibrositis is a controversial diagnosis and many doctors do not believe it exists at all. (R. 558) Dr. Barbuto confirmed Dr. Goka on this point. Insofar as the plaintiff's fibrositis claim is concerned, Dr. Barbuto testified:

> Q. Now, doctor, Dr. Goka has been here earlier and you have reviewed his records as well. He has testified as diagnosing Mr. Sanders and he said it is his opinion he has fibrositis. Are you familiar with that diagnosis?
>
> A. Yes.
>
> Q. Can you tell us, is that a controversial kind of diagnosis?
>
> A. It is a very controversial symptom. First of all, because lots of people don't believe it can exist. Some do believe it exists. It is usually invoked in the same kind of patient we see stress physiology. Very often in these kinds of accidents and tension headaches. If you look at the description, what is called fibrositis, it is often the same as called tension headaches, low back pain. If you look at the medical literature, and I have a

> number of examples here, they refer to it as a nebulous thing. People are not really sure what it is. It doesn't exist when they look at demographics, which are studies of population dynamics, ... (R. 691)

Dr. Barbuto then read about fibrositis from Beeson and McDermic, a well-accepted, authoritative, two volume medical textbook:

> A. "The term 'fibrositis' has been applied to a poorly defined symptom complex which is characterized by pain and stiffness in various areas. Most commonly, the neck, shoulder girdle and the posterior aspect of the trunk, the back, the low back . . . the soft tissue will be muscles and the tendons and things that hold them all together. Physical signs . . . many laboratory and roentgen ray studies are negative. The term fibrositis is based on vague hypothesis and common usage rather than on anatomic abnormalities. A localized area of tenderness common in the peripheral area medial to the scapula, have been termed 'trigger points.' The syndrome usually begins in middle years of life because the majority of patients appear tense and anxious, have few recognizable objectable basis for their symptoms. The symptom is often considered psychogenic, which means pain and stiffness can be manifestations of a majority of (reading very rapidly) . . . an exclusion of more defined illnesses. [Emphasis added]
>
> That is the kind of thing people write about fibrositis. (R. 691, 693)

Dr. Barbuto then stated he had a computer service called Medline. (R. 693) Using Medline he excerpted and abstracted all articles written on fibrositis from 1979 on, and he brought a thick computer printout with him to court. (R. 694) Dr. Barbuto summarized the literature as follows:

A. Basically, everything everybody sort of says is, "Well, I don't see anything. Okay, maybe there is something there but whatever it is, it's beginning, it is not a big deal." People try injections or just some known steroid medication. Every conclusion basically seems to be: Okay, find something. There is something there because people complain of something but whatever it seems to be is not enough to produce abnormalities of the tests and not enough to be serious. And basically most of the articles come out with their conclusions being reassuring this isn't serious and put them on some local anesthetics which are the shots and some muscle relaxants or some tranquilizers and most of the articles reflect the use of amitriphyline which is a drug we use very commonly for treating tension headaches. Many of the articles refer to stress and anxiety. Many of these articles refer to the role of anxiety and stress processes and this kind of thing. (R. 695)

Dr. Barbuto did not believe that any of Sanders' perceived symptoms were as a result of the automobile accident of September, 1982, including Sanders' position that he was a victim of fibrositis. Dr. Barbuto testified:

Q. Now, can fibrositis be caused simply by old age and stress incident to old age according to the literature?

A. Since people argue as to what it is and if it even is, it becomes harder still to argue what causes it. As I said, many people refer to it as psychiatric illness or a psychology process where it is stress related. Many of the articles refer to high correlation with that. . . .

Q. If we assume, hypothetically, that Mr. Sanders has what we have difficulty defining as fibrositis, do you have an opinion as to whether or not the accident would be a cause of that kind of manifestation later on?

> A. Well, yeah, I have some opinions. I think, first of all, when we are talking about fibrositis, we are talking about this nebulous thing. Secondly, we observe again that people with not compensated accidents or the other person in those kinds of accidents, doesn't get fibrositis. So, that suggests that it is not something that is a derivative of the accident. So, therefore, we are dealing with an entity when they are talking about fibrositis that is not very clear and such sayings related to an accident is more abstract because it does not correlate with a lot of the things that one would expect from the accident. We don't see it, for instance, in everybody. That sort of thing. (R. 696, 697)

In his brief, plaintiff claims Dr. Barbuto had only read one article on fibrositis and that article accounted for the doctor's expertise on the subject. This simply was not true as Dr. Barbuto's testimony made abundantly clear. (R. 691, 692, 695)

Also, plaintiff claims that in formulating his opinions, Dr. Barbuto did not review other doctors' reports and medical records. This claim is false. Dr. Barbuto did review all available medical records on James Sanders after he examined him but before formulating his opinion. (R. 669) The doctor explained the reason he proceeded in this fashion was to enable him to be totally objective and to examine the patient without any preconceived notions. (R. 669)

It is clear that Dr. Barbuto had the same access to medical reports and information as did Dr. Goka and yet Dr. Barbuto did not conclude that plaintiff sustained any injury in his accident of September 25, 1982. In fact, before he testified

at trial, Dr. Barbuto reviewed all of Dr. Goka's records, the records from the St. Luke's Pain Clinic, and Sanders' test results. His opinion was unshaken. (R. 713)

Plaintiff did not see Dr. Goka until more than a month and a half after he saw Dr. Barbuto. (R. 561) Dr. Goka never personally diagnosed a cervical strain since by his own testimony, had Sanders sustained a cervical strain, its effects would have lasted only six to eight weeks. (R. 525) Dr. Goka asserted that plaintiff had fibrositis which was an outgrowth of an injury which plaintiff sustained in the September, 1982 accident. On cross-examination, however, Dr. Goka was forced to admit that records from St. Luke's contained references to Sanders sustaining whiplash injuries in two accidents prior to September 25, 1982. (R. 592, 593) Dr. Goka did not know what medical treatment plaintiff may have received because of these accidents, and he never discussed the matter of these accidents with any personnel from St. Luke's. (R. 593) Plaintiff chose not to call any of the doctors at St. Luke's to testify.

In his brief, plaintiff misstates Dr. Goka's testimony in numerous critical instances. For example, plaintiff asserts that Dr. Goka "made specific reference to the findings of two other doctors, Dr. Evans and Dr. Rich, both of whom saw plaintiff promptly after the accident and reported that plaintiff suffered a cervical strain in his collision with defendant." (Plaintiff's Brief, p. 11) This statement is simply untrue. Reports of Dr. Evans and Dr. Rich were not in evidence. These doctors did not

testify. Moreover, Dr. Goka testified he did not see a report from Dr. Rich nor did he talk to Dr. Rich about his prognosis. (R. 582, 583) The only reference to Dr. Rich was in cross-examination when defendant's counsel asked if it was true that Dr. Rich found "no neurological deficit." To reiterate, plaintiff's claim that Dr. Goka read from Dr. Rich's report and that this helped Dr. Goka formulate his opinion, is simply contrary to Dr. Goka's testimony. As noted, Dr. Goka was not aware of Dr. Rich's report and never spoke with him. (R. 583)

Insofar as Dr. Evans is concerned, there is no evidence in the record as to what Dr. Evans' report consisted of. There is no evidence suggesting that Dr. Evans concluded that plaintiff was injured in the September 25, 1982 accident with plaintiff. In his testimony, Dr. Goka did say he reviewed a report from Dr. Barbuto and reviewed certain radiographic studies of plaintiff. (R. 527) However, Dr. Goka never explained how these matters assisted him in any way in formulating the opinions he reached since Dr. Barbuto concluded that there were no signs that plaintiff sustained any injury and since the radiographic studies of Sanders were normal.

In his brief at page 9, plaintiff makes the incorrect statement that he suffered from tinnitis and that "independent testing performed by Dr. Nielsen, an ear specialist, stated that the tinnitis was a direct result of the subject automobile accident." There is no such evidence in the record and the record citations contained in plaintiff's brief are misplaced. Dr.

Nielsen did not testify and no medical reports of his were admitted into evidence. (R. 550) In his testimony, Dr. Goka did allude to a report from Dr. Nielsen which suggested tinnitis was related to the accident, but it is clear that Dr. Nielsen did not see Sanders except on referral from Dr. Goka, and the only information Dr. Nielsen, or Dr. Goka for that matter, had about the accident of September 25, 1982, was what plaintiff told them. Insofar as tinnitis is concerned, Dr. Goka admitted that his belief that plaintiff suffered from tinnitis was based upon subjective, not objective, criteria. (R. 565-567)

In his brief at page 8, plaintiff claims that "Dr. Goka testified that St. Luke's medical reports were submitted to him and that these confirmed that James Sanders had suffered a cervical strain which in turn caused fibrositis." In referring to those records, Dr. Goka's testimony was, "he [Sanders] had a flexion extension injury caused by a cervical strain, <u>although</u> he had fibrositis and also he was depressed." (R. 548) There is no evidence suggesting that the St. Luke's records ever implied a causal relationship between cervical strain and fibrositis. Moreover, the records from St. Luke's noted that plaintiff sustained cervical strain in two accidents prior to September 25, 1982. (R. 592)

Plaintiff contends that Dr. Goka was an expert in fibrositis and yet neglects to inform the court that Dr. Goka, himself, testified fibrositis is a controversial diagnosis and many qualified physicians simply do not believe in it. (R. 558)

Plaintiff contends that Dr. Goka referred him to the St. Luke's Pain Clinic in Phoeniz, Arizona. However, Dr. Goka admitted that plaintiff's counsel suggested that this referral be made and that plaintiff's counsel wrote him a letter which read in pertinent part as follows:

> It would help me if in your letter to St. Lukes you make it sufficiently strong, as a matter of medical necessity, dealing both with the injury, the resultant fibrositis and the resultant depression that is all connected to the automobile accident of September 25, 1982 and is all necessary as a medical matter. (R. 589)

On cross-examination, Dr. Goka admitted that when he first saw plaintiff on April 13, 1983, he reviewed plaintiff's x-rays which were normal, plaintiff's myelogram results which were normal. (R. 81) He found no objective signs of tinnitis. (R. 567) He read Dr. Barbuto's report and agreed that there were no neurological issues. (R. 568) Although he equivocated with fibrosities patients, he agreed with the concept of secondary gain and that the very idea of rewarding symptoms is a primary cause of the symptoms themself. (R. 576) He admitted during his treatment of plaintiff that plaintiff had a high anxiety level and he conceded that anxiety and stress can cause the manifestations of headaches, neck pain and shoulder pain (R. 584), and that pain can be psychogenic in origin caused by stresses, depression and other things totally unrelated to trauma. (R. 586) Dr. Goka also admitted that the St. Luke's Pain Clinic administered a number of tests to plaintiff -- EEG, Cat scans,

etc. -- and that the results of these tests were all negative and showed no abnormality of any kind. (R. 588)

Dr. Spencer, a Board certified orthopedic surgeon, was the final witness who testified at trial. He examined plaintiff in March of 1984, and he reviewed all medical records pertaining to plaintiff.

In his brief, plaintiff attempts to convince the Court that Dr. Spencer did not review the medical records pertaining to him because according to plaintiff, Dr. Spencer was not interested in the "inuendos and inferences" of treating physicians. Plaintiff's attempted criticism of Dr. Spencer is wholly misplaced. On cross-examination, Dr. Spencer explained:

> Q. Another thing I want to clarify, as I understood your testimony at the start of your direct examination, you said that you thought you had all of these various reports that you have listed available in hand but that you examined Mr. Sanders and then went through them to see if they confirmed or disagreed with whatever was your diagnosis?
>
> A. What I try and do is try and be as objective as I can. So I don't get a bias built in from other examiners. But I also try and make sure I don't miss an area that has been brought out before that the patient either has forgotten about or doesn't want to bring it out. And so I review that, as I talked with him briefly, but I go into the analysis later.
>
> Q. Analysis of the other reports?
>
> A. Right.
>
> Q. If you wanted to have everything, these other sources could feed you. You would study them carefully before your

examination so you couldn't miss anything in what they had?

A. If I were interested in the innuendos and the inferences and before the examination, then that would be the best way to do it, yes.

Q. Essentially, you put them aside until you have completed your examination and then you work from them in detail?

A. That is right. To make my diagnosis, I evaluate the patient's story he told. The physical examination and the record. (R. 774, 775)

In his brief at page 16, plaintiff states, "Neither Dr. Barbuto nor Dr. Spencer made any claim or statement that plaintiff had not been injured as he claimed." This statement is not true. Dr. Barbuto's testimony is detailed above. Dr. Spencer's testimony is summarized below. Both doctors testified they saw no evidence of any injury.

Dr. Spencer tested plaintiff's range of motion and found it to be normal. (R. 747, 748) Plaintiff had a normal grip pattern, normal circumference of his two arms, normal Atkins test and normal sensation. (R. 748-750)

Dr. Spencer noted that plaintiff said he had tenderness in several sites but that when the doctor palpated these areas with plaintiff distracted, there was no sign of tenderness. (R. 750-752) Dr. Spencer also noted that plaintiff complained of decreased sensation in the forearm area but that this claim made no anatomical sense. (R. 751) Regarding these subjects, the doctor testified:

Q. Did you do any pushing or palpatation with Mr. Sanders distracted or doing something else?

A. I did. I wanted to evaluate. See, pain is strictly a subjective situation and you have to rely entirely on the patient's response.

Q. So you say when you are talking about these areas of tenderness that that was a subjective kind of a thing where you pressed and he said it hurts?

A. That is right. So, I did repeat these tests when he was distracted and looking away and was responding to another request of mine and I didn't find that tenderness or complaints of pain when these areas were palpated. That is, he didn't respond or withdraw or didn't pull away to indicate that those areas were tender.

Q. Was that significant to you?

A. I felt it was significant. I felt that perhaps his pain was not an objective type of pain.

Q. Now, did Mr. Sanders describe -- you say he described some decreased sensation?

A. Yes, he stated there was a decreased sensation over the front part of his arm, forearm area, in the small end that included his thumb. And that is atypical for the way our bodies are put together. The nerves don't supply an area that isn't formed from the thumb clear on up into the arm. So this is impossible to explain on the basis of the anatomy of the body. (R. 750, 751)

Dr. Spencer testified that he saw no objective signs of any injury. He stated:

I didn't find anything that I could measure by way of loss of motion, outside of the small perimeter that he was -- that

> was slightly different or reduced from normal. I didn't find any reproducible areas of tenderness when he was distracted. I think he does have areas of tenderness on exam when I would examine him directly, that was reproducible. (R. 752)

Dr. Spencer also observed that he reviewed the x-rays and myelogram of plaintiff. On these documents, he saw some evidence of degenerative disc disease which was wholly unrelated to any kind of trauma which plaintiff may have experienced. (R. 753, 754, 755)

In explaining plaintiff's symptoms, Dr. Spencer testified they did not fit any objective pattern and were psychogenic in origin. (R. 756) Dr. Spencer also felt that degenerative disc disease unrelated to the accident played a role in producing Sanders' perceived symptoms. The doctor testified:

> A. Well, I felt that his symptoms were possibly relating to pre-existing changes, degenerative changes that we talked about and probably some other reason that I couldn't objectively measure. I felt that the symptoms didn't fit objective patterns. They were what we call "psychogenic in origin."
>
> Q. You better explain those terms. You said it didn't fit an objective pattern. What do you mean by that and then what do you mean "psychogenic in origin"?
>
> A. I always give the patient the benefit of the doubt and try and find reasons for the pain. Particular injury, particular area of weakness, particular nerve that is involved. Something that is reproducible, that you can go back time and time again and find and I couldn't find those things. And so, if you don't find the objective reasons, arthritis,

fracture, dislocation, then you have to assume there is some other cause and you have to look for a psychological ideology.

The doctor further explained as follows:

A. Well, I felt that there was probably an alternate reason for his symptoms appearing. We talked about the term "secondary gain." When you talk about psychological sources of pain, what that means is that there is a gain to the patient for having the symptoms, as bizarre as that sounds. The primary gain that a patient comes to you with is to have those symptoms alleviated. But if there isn't a primary gain, there often is secondary gain where the individual has symptoms which are maintained to receive some compensation of some type. Social, emotional, reassurance from family, relief from the stresses of his daily life, employment pressures that are on him, financial pressures, sometimes there are actual monetary gains. Usually these are in injury situations. You don't see them in people, as a rule, who are employed, who are earning an income, who are coping with life. Did I mix you up?

Q. No. No. So, is this your conclusion of the symptoms that Mr. Sanders was experiencing psychogenic pain and there was a secondary gain that was present there?

A. I felt that -- I was chasing the diagram notice here. His symptoms were due to, one, a degenerative cervical and spine disc decrease. What that means, degenerative of the cervical and dorsal spine.

Q. When we talk about degenerative changes, we think about changes that happen when a person gets older?

A. That is right, with age or with earlier injury. And those are manifest by the narrowing of the disc, by the arthritic changes that are shown. And then

> secondly, I felt there was an over-reactive personality that fits this category of the psychological or psychogenic type of pain. (R. 756-758)

The doctor observed that intervening stresses, anxiety and tensions such as financial difficulties and marital problems probably played a key role in Sanders' condition. (R. 759)

Insofar as fibrositis is concerned, Dr. Spencer said he had treated a number of patients who had been diagnosed as having fibrositis. (R. 762) He described the fibrositis diagnosis as controversial and based strictly on subjective feelings. (R. 761) He stated:

> It's a diagnosis that is reached by conclusion of any other disease process and there is not a way to measure what it means. And the feeling has been in some circles that this is kind of a waste basket diagnosis. (R. 761)

Dr. Spencer was then asked if plaintiff had fibrositis. He responded as follows:

> A. Well, I concluded that he didn't. The reasons are these: 1, is he did not have a reproducible pain picture [sic.] which distracted. Secondly, his pain was diffuse and not localized to what are called "trigger points" in those who have written of this type of syndrome. And I felt, thirdly, that during the examination that there was a tendency toward over-exaggeration. Most patients who have a problem will exaggerate to some extent to make sure it is recognized. I felt above and beyond that normal pattern there was a giving way of testing and overreactivity. Fourthly, there appeared to be an inappropriate attitude or emotion. He didn't have the typical concern about the problem that you would expect an individual to have with an injury. (R. 761, 762)

Dr. Spencer testified that the tinnitis to which plaintiff complained would not be caused by cervical strain. He said there are multiple causes of tinnitis but cervical strain is not one of them. (R. 53, 63)

Dr. Spencer concluded that plaintiff suffered from no physical impairment (R. 763), that he could work full time and this would in fact be therapeutic for him (R. 764), that there was no reason for plaintiff to limit his activities or hobbies and that the only treatment plaintiff may need would possibly be psychiatric in nature. (R. 765, 766) The doctor concluded:

> A. I didn't find any objective reasons for his discomfort. I felt there was this over-exaggeration of his symptoms and he did have a difficult social background in the past and he fit the pattern for someone with an emotional psychogenic or emotional source of pain. (R. 765)

Evidence was elicited -- much of which Sanders equivocated about or denied, thereby seriously compromising his credibility -- establishing that Sanders experienced numerous stresses in his life which the doctors testified could cause all of the symptoms of which Sanders complained. Within the space of a few years and before his accident with Ahlstrom, plaintiff had a hernia operation, back fusion, cancer, surgery resulting in the removal of a testicle, and over 50 radiation and chemotherpay treatments. (R. 488-490) Plaintiff admitted being involved in two prior and one subsequent accidents and said he was "scared as hell" to drive a car. (R. 471) Plaintiff's wife lost her job as a chemist in 1983, and plaintiff experienced marital difficulties

and financial difficulties shortly after his accident. (R. 494-497, 499, 618, 631) Plaintiff did not get along well with his employer, Farmers Insurance Company, and wanted to change jobs. (R. 631) He moved into a new neighborhood subsequent to the accident. (R. 472, 473) All of these pre-existing and intervening stresses are the kinds of things the doctors testified could cause Sanders' perceived symptoms of headaches, neck pain, shoulder pain and ringing of the ears.

SUMMARY OF ARGUMENT

Succinctly stated, plaintiff argues that there was no evidence suggesting he was not injured as a direct and proximate result of the September 25, 1982, automobile accident with Kristin Ahlstrom, and therefore the unanimous jury verdict was wrong. Plaintiff seeks to convince this court that reasonable people could never have concluded as did the jury unanimously in this case and, therefore, the verdict of the fact finders should be discarded. He also seeks to convince the court that the District Court Judge who weighed and considered the evidence abused his discretion when he denied plaintiff's motion for new trial. This argument is untenable for the following reasons, any one of which is sufficient to uphold the jury verdict and trial court judgment.

The jury was entitled to discount or disbelieve plaintiff's testimony regarding his claimed injury. The burden of proof rested with plaintiff, and he failed to meet his burden.

Credible evidence suggested that plaintiff was not injured in the September 25, 1982 accident. If the jury believed plaintiff was injured, credible evidence suggested that those injuries resulted from prior accidents, subsequent accidents, stress, anxiety, pre-existing degenerative disc disease, or other causes unrelated to the September 25, 1982 accident. If injured at all in the September 25, 1982 accident, plaintiff recovered within a few days or at most, a few weeks. His medical expenses did not exceed $500, he had no permanent impairment or disability, and therefore no valid tort cause of action existed.

ARGUMENT

I.

BURDEN OF PROOF AND STANDARD FOR REVIEW.

In this case, there is no indication that the jury misunderstood or failed to take into account proven facts, misunderstood or disregarded the law or rendered a verdict without factual support in the evidence. On the contrary, the verdict is reasonable and was rendered after careful and thoughtful deliberation by an eight person jury. Similarly, Judge Russon denied the motion for new trial after the same careful and thoughtful deliberation.

Proximate cause, like negligence, is peculiarly a factual question for the jury. Waters v. Querry, 626 P.2d 455 (Utah 1981); Jensen v. Mountain States Telephone and Telegraph Co., 611 P.2d 363 (Utah 1980). Once a jury has served its function and "found the facts", these findings should be given every presump-

tion of validity and should be disturbed only if there is no basis in the evidence to support them.

Plaintiff, of course, had the burden of proof. The jury unanimously found that he failed to meet that burden. The case of Gilhespie v. DeJong, 520 P.2d 878 (Utah 1974), speaks clearly to the burden of proof issue. In Gilhespie, a bicyclist brought an action for personal injuries he sustained when struck by an automobile driven by defendant. The jury found for defendant and the trial court entered judgment on the jury verdict. On appeal, plaintiff argued, "There is no substantial competent evidence to support the verdict of the jury." In affirming the trial court, this Court stated:

> It is to be observed that this proposition misplaces the burden of proof. That is, it seems to assume that there must be substantial evidence to support the jury's refusal to find for the plaintiff; whereas, the burden was upon the plaintiff to make the proof to justify a verdict for him; and if the jury were not so persuaded by a preponderance of the evidence, they were not obligated to render such a verdict.

The recent case of Anderson v. Toone, 671 P.2d 170 (Utah 1983), is directly on point. In this case, plaintiff, a passenger in a dune buggy, brought a negligence action against the driver to recover damages plaintiff sustained when the dune buggy flipped over. The trial court judge entered judgment in favor of defendant on the jury's special verdict. He then denied plaintiff's motion for new trial. This Court affirmed on appeal. In discussing the role of the jury and the applicable standard on

appeal, this Court stated:

> Moreover, it is the prerogative of the jury to believe one witness over another and to weigh the evidence. See Hindmarsh v. O.P. Skaggs Foodliner, 21 Utah 2d 413, 446 P.2d 410 (1968). On appeal we will review the jury's verdict in a light most favorable to the prevailing party. Lamkin v. Lynch, Utah, 600 P.2d 530 (1979), and accord the evidence presented and every reasonable inference fairly to be drawn therefrom the same degree of deference. Webb v. Olin Mathieson Chemical Corp., supra. Id. 172.

In discussing the trial court's refusal to grant a new trial based upon plaintiff's allegation that the verdict was not supported by the evidence, this Court stated:

> The trial court has wide discretion to grant or deny a motion for a new trial and we do not reverse a denial unless the "evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." Id. 173.

This Court then noted that as long as the trial court did not abuse its discretion in failing to grant a motion for new trial, the Supreme Court "cannot interfere." Id. 173.

Lee v. Howes, 548 P.2d 619 (Utah 1976), involved an action by a minor plaintiff for injuries she suffered when struck by defendant's automobile. The trial court entered judgment of no cause of action on a jury verdict and denied plaintiff's motion for new trial. This Court affirmed on appeal and in so doing stated:

> In addition to what is said about the prerogatives of the jury, there is the

> further proposition that the trial court reviewed this case and the arguments of counsel in connection with his decision to deny the motion for a new trial. This court has always recognized that the trial court has considerable latitude of discretion in the granting or denying of a motion for a new trial in accordance with his judgment as to what the ends of justice require; and that his rulings thereon should not be overturned unless it appears that his action clearly transgressed reasonable bounds of discretion.
>
> This case falls within the ruling we have heretofore announced: that the purpose of the trial is to afford the parties a full and fair opportunity to present their evidence and their contentions and to have the issues in dispute between them determined by a jury; and that when that has been accomplished we will not disturb the determination made by the jury and the trial court unless it is shown that there was substantial and prejudicial error which prevented a fair trial, or that there is no substantial basis in the evidence upon which reasonable minds could conclude as the jury did. Id. 621.

In his brief, plaintiff cites and then tries to distinguish the recent Utah decision of Christenson v. Shear, 688 P.2d 467 (Utah 1984). Christenson was a case very similar to the instant case where the jury found that:

> . . . plaintiff's claimed injuries were not proximately caused by the defendant's negligence running into the rear end of her car at a traffic stop.

The Supreme Court affirmed the jury verdict and trial court judgment refusing to disturb the jury's findings on the proximate cause issue.

In the present case, plaintiff does not claim the jury

was improperly instructed on the causation issues. Rather plaintiff simply says the jury wrongly decided the issue. However, as recent decisions of this Court attest, a jury verdict on a factual issue after proper instructions are given deserves great weight and deference.

II.

JURY WAS ENTITLED TO DISCOUNT OR DISBELIEVE SANDERS' TESTIMONY.

The only basis the jury had to determine that plaintiff was injured in the September 25, 1982, accident was plaintiff's own self-serving testimony. Dr. Goka had no knowledge concerning the accident and the cause of plaintiff's alleged symptoms other than what Sanders related.

In Instruction No. 4, an instruction to which plaintiff took no exception, the jury was told:

> You are the exclusive judges of the credibility of the witnesses and the weight or convincing force of their testimony. In so judging, you can take into consideration any interest a witness may have in the lawsuit and any bias or probable motive, or lack thereof, to testify as they do, if any is shown. You may also consider the deportment of witnesses upon the witness stand, the reasonableness or lack thereof of their statements, their frankness or the want of it, their opportunity to know, their ability to understand, their capacity to remember, and whether any witness contradicted himself or herself, and then determine therefrom, in accordance with your honest convictions, what weight and credibility you should give to the testimony of each witness, measured by reason and common sense and the rules set forth in these instructions.

> If you believe a witness has wilfully testified falsely to any material matter in this case, you may disregard the whole of the testimony of such witness except as you find it to have been corroborated by other credible evidence, in which event you should then give it the weight to which you find it is entitled. (R. 231)

See also Instructions 6, 7 and 10, to which plaintiff likewise took no exception. (R. 233, 234, 237) The instructions are attached as Appendix 4, 5, 6 and 7, respectively. These instructions admonish the jury as fact finders to resolve all conflicts in the evidence and to reject evidence and testimony of witnesses altogether if the jury felt there had been falsification or the reasons given for the testimony were unsound.

Sanders, who certainly had a motive to pin all of his perceived problems on his September 25, 1982, automobile accident, gave testimony that was unreasonable and riddled with hyperbole, falsification and untruths. For example, Sanders testified as follows:

Plaintiff claimed to have received more medical treatment which cost more money than was actually the case. For example, plaintiff testified that he reviewed all medical bills and back up documentation before submitting a proposed exhibit showing medical expenses of $13,156.65. (R. 469, 503, 504) These expenses could not be proven and the exhibit was never received as evidence. (R. 740, 741) Therapy expenses with Elaine Lu are an example of the exaggeration of expenses. When confronted with the actual bills on cross-examination, plaintiff was forced to

recant his prior testimony and admit that his therapy expenses were several hundred dollars less than what he had previously testified under oath. (R. 505-508) Finally, plaintiff's counsel reduced his claim for medical expenses to $10,000 to which defendant's counsel stipulated with the following caveat:

> I do not stipulate and sharply contest that these charges, any of them are as a result of the accident and that the medical expenses were necessary. (R. 741)

Plaintiff testified he never told Ahlstrom or anyone else that he experienced a "prior whiplash." (R. 511) This is completely contrary to the unequivocal testimony of Ahlstrom, the testimony given by Mrs. Ahlstrom's son and mother, and is inconsistent with testimony given by the investigating officer. (R. 651-653)

Plaintiff was involved in a serious automobile accident in July of 1983, the effects of which he tried to downplay and discount. (R. 491-493) However, the photographs of plaintiff's Fiat automobile involved in that accident obviously depicted the impact and force of the accident was much more severe than was the case in the accident of September, 1982. (See Exhibits 13-D - 20-D)

Plaintiff exaggerated the impact speed, force of impact, and damage to his car resulting from the September, 1982 accident. (R. 354, 355) The photographs show that damage to the vehicles was minimal in this accident and the impact speed, given the fact that Sanders' car was knocked forward only a few feet, had to be very low. (Exhibits 2-P, 30-D) (David Lord testified

that had the impact speed been 20 mph, Sanders' car would have been knocked forward 30 feet and had the impact speed been but 15 mph, Sanders' car still would traveled ahead 18 feet). (R. 415, 416)

On the witness stand, plaintiff tried to give an account of the accident which would comport with Dave Lord's testimony, i.e., Sanders did not know the distance his car was knocked forward at the time of the accident, the color of the traffic light, or whether cars in front of him had already started to move at the time of impact. (R. 429, 430, 511-514) The trouble with plaintiff's new account of the accident as was pointed out on cross-examination was that it was contrary to what Sanders said in his deposition. At his deposition he said he stopped within a car length, the light was red when the accident occurred, his car was knocked forward two or three feet and he came to a stop within half a car length of the car in front. (R. 511-514 and Deposition of James Sanders, pp. 24, 43, 44)

Although he had separate files to review for each insurance policy he maintained, (R. 514) plaintiff in an apparant attempt to bolster his claim for loss of income testified that by June of 1984, his insurance policy count dropped to 213. (R. 514, 515) But plaintiff's supervisor Hal Brostrum testified and produced records which were received as exhibits which clearly established that Sanders' policy count was 451 in June of 1984. (R. 610, Exhibit D-29)

Sanders denied ever saying he did not want to return to

work for Farmers, yet the evidence reveals this is precisely what he said to Carl Checka, a rehabilitation specialist who testified at trial and what he also said to personnel at the St. Luke's Pain Clinic. (R. 631)

On direct examination, plaintiff testified his income had dropped off markedly since the accident (R. 454, 455, 462), yet on cross-examination he was forced to admit it had actually been greater since the accident. In fact, Sanders' net income figures from 1978 through 1983 were $745, $2,065, $2,083, $1,571, $2,267 and $3,462, respectively. The most income Sanders ever earned during this five-year period was 1983, the year following the accident. (R. 517, Exhibits 13, 21-25) Yet, Sanders tried to convince the court and jury that he sustained a significant loss of income.

The symptoms of which plaintiff complained were unreal. Dr. Spencer testified that when he conducted his examination, Sanders complained of several tender or trigger sites but that when Dr. Spencer palpatated Sanders with Sanders distracted the areas were not tender. (R. 750-752)

Sanders exaggerated or falsified his symptoms. Despite all of Sanders' protests, medical persons found no objective signs of any injury. (See generally testimony of Dr. Barbuto and Dr. Spencer)

One of the intervening stresses which could have caused Sanders' perceived problems was financial difficulties. On the witness stand, Sanders tried to skirt around this by saying his

wife lost her job before the September 1982 accident. However, Sanders was forced to admit on cross-examination, the tax returns clearly show Mrs. Sanders lost her job in 1983 after the accident and not 1982, before the accident. (R. 496, 497)

The foregoing are merely illustrative. But as noted, plaintiffs' testimony was riddled with inconsistency, exaggeration, and falsification. The jury as a group of reasonable people would have been fully justified in disregarding Sanders' testimony entirely and concluding that the various symptoms of which he complained were not real or had nothing to do with the minor, fender-bender automobile accident in which he was involved on September 25, 1982.

III.

ABUNDANT EVIDENCE SUGGESTS SANDERS WAS NOT INJURED IN THE SEPTEMBER 25, 1982 ACCIDENT.

Dr. Barbuto saw and tested Sanders in February of 1983. Dr. Barbuto testified that at that time -- just a few months after the accident -- Sanders was not disabled or impaired in any way, there were no objective signs of injury, and the symptoms of which Sanders complained had nothing whatsoever to do with his prior automobile accident, but rather were probably a result of unrelated stress and tension or secondary gain. (R. 660-697, 713) From Dr. Barbuto's testimony alone, the jury could reasonably infer Sanders was not injured in the accident of September 25, 1982.

Dr. Spencer saw and tested Sanders in March of 1984. He likewise concluded that Sanders' was not disabled or physically impaired, there were no objective signs of any injury and that Sanders' "symptoms" must result from some cause other than the September 1982 accident. Dr. Spencer thought there were several explanations for Sanders' subjective complaints, not the least of which were pre-existing psycological problems, intervening traumatic events, and a very real secondary gain phenomenon caused not by the accident but by the lawsuit. Dr. Spencer testified there was no reason Sanders should restrict or limit his activities in any way. (R. 743-766) Once again, from this testimony alone, the jury could certainly conclude Sanders sustained no injury on September 15, 1982.

Neither from their examination of Sanders or their review of the medical records did Dr. Spencer or Dr. Barbuto observe any objective signs of injury to Sanders. X-rays were normal, orthopedic and neurologic tests were normal, CAT-scans were normal, other tests were normal. On the basis of all of this evidence plus the minor impact speed of the automobiles, Sanders activities after the accident (going to lunch with his family), and Sanders' own lack of credibility, a jury could certainly have concluded that Sanders was not injured at all in the accident.

In an attempt to bolster his claim that he sustained injury in the September 25, 1982 accident, plaintiff makes statements in his brief which simply are not true. Many of these

statements have been discussed above in the Statement of Facts. However, some additional discussion is warranted here. In his brief at page 24, plaintiff states, "He felt immediate back and neck pain when defendant's car struck his car. Plaintiff's wife confirmed this." This statement is a misrepresentation of the record. Mrs. Sanders' testimony is contained at pages 615-620 of the record. She was not asked a single question about this subject matter.

In his brief at page 25, plaintiff claims that Dr. Gordon Evans diagnosed him as having suffered a cervical strain in the collision. Plaintiff relies on pages 526 and 527 of the record to support this claim. Plaintiff's claim is false since there is no evidence in the record of Dr. Evans' diagnosis. Plaintiff claims that Dr. Rich confirmed Dr. Evans' diagnosis and cites pages 582 and 583 of the record in support of this claim. Once again, the record is devoid of support for plaintiff's claim.

At page 29 of his brief, plaintiff makes the very interesting assertion that neither of defendant's doctors are in a position to say that plaintiff had not sustained a cervical strain in the September 25, 1982 accident because they examined him for the first time long after the three to 12 week healing period for the cervical strain had run. The inconsistency of plaintiff's position is obvious. On the one hand, plaintiff claims that Dr. Barbuto's testimony should have been discounted by the jury and yet on the other hand, claims the jury should

have readily endorsed Dr. Goka's testimony even though Dr. Goka did not first see plaintiff until a month and a half after Dr. Barbuto did.

On page 33 of his brief, plaintiff states: "The negative evidence given by Drs. Barbuto and Spencer that they did not see evidence of the original injury when they examined plaintiff is not sufficient to overcome the positive evidence of Drs. Evans and Rich." Once again, this position is curious since Drs. Evans and Rich gave no evidence and no medical reports from them were introduced into evidence. Plaintiff's position is also curious since both Dr. Barbuto and Dr. Spencer testified at trial, gave their opinions that they saw no signs or evidence of injury and yet both of these doctors reviewed the medical records on plaintiff including reports by Dr. Evans and Dr. Rich and Dr. Barbuto even spoke orally with Dr. Rich whereas Dr. Goka did not review any reports from Dr. Rich and never spoke with him.

IV.

SUBSTANTIAL AND CREDIBLE EVIDENCE SUGGESTS SANDERS' INJURIES, IF ANY, RESULTED FROM PRIOR ACCIDENTS, SUBSEQUENT ACCIDENTS, STRESS, ANXIETY, OR OTHER CAUSES UNRELATED TO THE SEPTEMBER 25, 1982 ACCIDENT.

There was substantial and credible evidence suggesting that Sanders' injuries, if any, occurred prior to the accident in question. Plaintiff had indeed sustained a prior whiplash. He told Kristin Ahlstrom this and she contemporaneously related what he had said to her son and mother. (R. 651-653, 725)

Additionally, plaintiff was questioned about medical records from St. Lukes' which he admitted having reviewed. (R. 729) There was reference in these records to whiplash injuries from two rear-end automobile accidents, both of which predated the September 25, 1982 accident. (R. 592) Also, Sanders himself admitted having a sore back and neck after one of the earlier accidents. (R. 435, 436) Additionally, Sanders said he had seen Burt Kidman, the physical therapist and chiropractor several times in the past for kinks in his back. Sanders refused to be more specific. (R. 485, 486) Interestingly, although Kidman was the first medical person seen by James Sanders after his September 25, 1982, accident, plaintiff chose not to call Kidman as a witness. Additionally, unrebutted testimony established Sanders' had previously experienced an operation where disks in his lower back were fused together. (R. 488) This certainly suggests serious prior back problems. In his brief plaintiff makes the unfounded accusation that defendant's insurance company represented the two drivers involved in Sanders' prior accidents. This claim is incorrect, false and improper. Defendant's insurer had no record of either accident and of course plaintiff refused to provide the names of other drivers or the dates of the accidents. (R. 510, 511)

As noted above, plaintiff was involved in an accident on July 3, 1983. Evidence was introduced showing the impact speed was high and damage to the vehicles significant. (Exhibits 13-D-20-D) Plaintiff's counsel himself introduced evidence

suggesting that Sanders was injured as a result of this July, 1983 accident.

Medical experts testified that stress and tension can cause physical problems -- tension headaches, ulcers, head and shoulder pain, fibrocitis -- and in their opinion, stresses and tensions played a significant role in Sanders' situation. (R. 670-676, 759) Abundant evidence established that Sanders was under a lot of stress and tension, and, as established by Dr. Barbuto and Dr. Spencer, there was really no nexus between these stresses and tensions and Sanders' September, 1982 accident. (R. 686-688, 759, 765) Sanders' stresses included the following: As noted, he had problems with work and did not desire to continue working for Farmer's Insurance Company. He experienced marital difficulties. He endured a serious bout with cancer resulting in the removal of a testicle and over 50 radiation treatments. He performed poorly at his job and experienced resultant financial difficulties which were exacerbated when his wife, a chemist, lost her job. He moved into a new home and strange neighborhood. He had serious pre-existing psychological problems so much so that Dr. Spencer testified that no future treatment except psychological counseling would be of any assistance to him. (R. 765)

Evidence established that secondary gain is a very real phenomenon and both Dr. Spencer and Dr. Barbuto thought it, not Sanders' September, 1982 accident, was a major cause of Sanders' perceived symptoms. (R. 677-684, 757)

V.

IF INJURED AT ALL, SANDERS RAPIDLY RECOVERED AND HAD NO TORT CAUSE OF ACTION.

Testimony from all doctors, including Dr. Goka, was uniform. The doctors stated that a cervical strain normally heals completely within a few days, or at most, a few weeks -- Dr. Barbuto "a few days" (R. 672); Dr. Goka "six to eight weeks" (R. 525).

In light of the clear medical testimony, it is reasonable to conclude that Sanders was not injured in the September 25, 1982 accident or that if he did suffer a neck strain, the strain healed completely within a couple of weeks, causing no disability or impairment whatsoever. If it is assumed, arguendo, that Sanders did sustain such a neck strain which healed within the time period all of the doctors said it would, it is clear that Sanders' "injury" resulting from the accident never exceeded the no-fault threshold prescribed by §31-41-9, Utah Code Annotated, (1954 as amended).

No evidence was submitted regarding exactly what medical expenses were incurred by plaintiff, when they were incurred, or if any of the medical expenses were necessary. Dr. Goka testified about future medical expenses, not past expenses. No one from any health care providers testified. Plaintiff was not qualified to testify whether medical expenses he incurred were necessary or not and indeed, he did not do so. On cross-examination, plaintiff finally admitted he did not know what

expenses were incurred or when they were incurred. (R. 443, 505-508) Dr. Spencer and Dr. Barbuto testified there was nothing physically wrong with plaintiff, that he was not disabled and that a cervical strain heals itself in very short order. On the basis of this testimony, the jury could certainly have inferred that any medical expenses which plaintiff incurred were not necessary even assuming plaintiff had sustained a cervical strain in the injury of September 25, 1982.

In short, there is no evidence that Sanders' medical expenses during the period of time it would take his claimed cervical strain to heal came close to $500, or that any medical expenses were necessary to facilitate the healing process. Moreover, the record is clear that from the testimony of Dr. Barbuto and Dr. Spencer that Sanders did not sustain any permanent impairment or disability. Therefore, Sanders simply had no valid cause of action and the jury verdict should and could be sustained on this basis.

CONCLUSION

On several bases the evidence clearly supports, sustains and upholds the jury's unanimous answer to Special Interrogatory No. 3 which reads:

> Did James Lee Sanders prove by a preponderance of the evidence that his injuries, if any, were proximately caused by the accident in question?
>
> Answer: No.

The jury was charged with the duty of finding the facts,

resolving conflicts in evidence, and believing the testimony they thought was credible. The jury did precisely that, and its verdict should not be ignored.

It should be noted that plaintiff's counsel did not and does not now object to the form of the Special Verdict which was given to the jury. He merely argues that the jury was comprised of eight persons, not one of whom reasonably could have concluded as he or she each did, and that the trial judge who heard and weighed the evidence, abused his discretion when he denied the motion for new trial.

For the reasons specified, the jury verdict should be upheld and the judgment of the trial court affirmed in all respects.

Dated this 14 day of May, 1985.

STRONG & HANNI

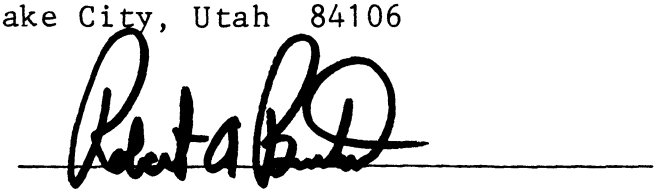
By 
Robert A. Burton
Attorneys for Defendant

MAILING CERTIFICATE

I HEREBY CERTIFY that four true and correct copies of the foregoing Respondent's Brief was mailed, first class postage

prepaid, this 14 day of May, 1985, to the following:

Samuel King
Attorney for Plaintiff
301 Gump & Ayers Building
2120 South 1300 East
Salt Lake City, Utah 84106



APPENDIX 1

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JAMES LEE SANDERS, Plaintiff, vs. KRISTIN S. AHLSTROM, Defendant.	SPECIAL VERDICT Civil No. C-83-692 Honorable Leonard Russon

LADIES AND GENTLEMEN OF THE JURY:

At the end of each question submitted to you, indicate whether you adopt it as your verdict by answering "Yes" or "No". You can answer "Yes" only if there is a preponderance of the evidence concerning the question.

In the event you cannot find an answer "Yes", and by a preponderance of the evidence, then you must find the same "No".

It requires the concurrence and agreement of at least six jurors to answer a question, and when six or more jurors agree upon an answer you should have the foreperson write in the answer and proceed to the next proposition.

When you have answered all propositions that require an answer, the foreperson should then sign and date the verdict and return it to the courtroom.

We the jury, duly impaneled in the above-entitled case, find the following answers to the interrogatories listed below:

1. Did the plaintiff, James Lee Sanders, prove by a preponderance of the evidence that the defendant, Kristin S. Ahlstrom, was negligent.

ANSWER: Yes

2. If you answered question 1 "Yes", then answer this question: Did James Lee Sanders prove by a preponderance of the evidence that such negligence on the part of Kristin S. Ahlstrom was a proximate cause of the accident?

ANSWER: Yes

3. If you answered questions 1 and 2 "Yes", then answer this question: Did James Lee Sanders prove by a preponderance of the evidence that his injuries, if any, were proximately caused by the accident in question?

ANSWER: No.

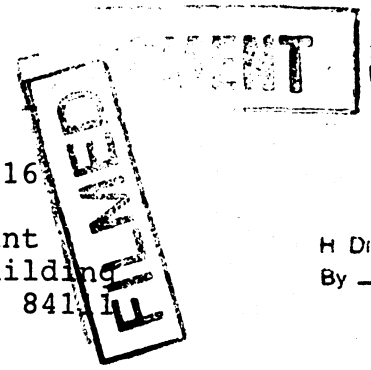
4. If you answered questions 1, 2 and 3 "Yes", then answer this question: What amount of money, if any, did plaintiff prove by a preponderance of the evidence he is entitled to recover from defendant?

Medical Expenses to date	$_____
Loss of Earnings to date	$_____
General Damages	$_____
TOTAL	$_____

Dated this 30 day of Aug, 1984.

Rick L. Jeppesen
Foreman or forelady

APPENDIX 2



ROBERT A. BURTON, #0516
STRONG & HANNI
Attorneys for Defendant
Sixth Floor Boston Building
Salt Lake City, Utah 841[illegible]
Telephone: 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

Bk. 191 No. 3472
10-18-84 - 9:12 a.m.

JAMES LEE SANDERS, et al.,

Plaintiffs,

vs.

KRISTIN S. AHLSTROM,

Defendant.

JUDGMENT ON SPECIAL VERDICT

Civil No. C83-692

Honorable Leonard Russon

The complaint of James Lee Sanders came on for trial before the Honorable Leonard H. Russon, one of the judges of the above-entitled court, sitting with a jury, on August 28, 1984. Plaintiff, James Lee Sanders, was represented by his attorney, Samuel King. Defendant, Kristin S. Ahlstrom, was represented by her attorney, Robert A. Burton. At the close of the evidence, the case was submitted to the jury on a Special Verdict. The jury answered the special interrogatories as follows:

1. Did the plaintiff, James Lee Sanders, prove by a preponderance of the evidence that the defendant, Kristin S. Ahlstrom, was negligent.

ANSWER: Yes

2. If you answered question 1 "Yes", then answer this question: Did James Lee Sanders prove by a preponderance of the evidence that such negligence on the part of Kristin S. Ahlstrom was a proximate cause of the accident?

ANSWER: Yes

3. If you answered questions 1 and 2 "Yes", then answer this question: Did James Lee Sanders prove by a preponderance of the evidence that his injuries, if any, were proximately caused by the accident in question?

ANSWER: No

4. If you answered questions 1, 2 and 3 "Yes", then answer this question: What amount of money, if any, did plaintiff prove by a preponderance of the evidence he is entitled to recover from defendant?

Medical Expenses to date	$_____
Loss of Earnings to date	$_____
General Damages	$_____
TOTAL	$_____

/s/ Rick L. Jeppesen
Foreperson

NOW, THEREFORE, in accordance with the jury's answers to the special interrogatories as set forth above, the court orders and directs judgment in favor of defendant, Kristin S. Ahlstrom,

and against plaintiff, James Lee Sanders, no cause of action, and awards defendant Ahlstrom costs of court incurred herein.

Dated this 15th day of ~~September~~ OCTOBER, 1984.

BY THE COURT:

Leonard H. Russon

Leonard H. Russon, Judge

ATTEST
H. DIXON HINDLEY
Clerk

By D. L. Bundley
Deputy Clerk

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

PATSY WYATT, being duly sworn, says:

That she is employed in the offices of Strong & Hanni, Attorneys for Defendant herein; that she served the attached proposed Judgment on Special Verdict

upon plaintiff's counsel

by placing a true and correct copy thereof in an envelope addressed to:

Samuel King
Attorney for Plaintiff
301 Gump & Ayers Bldg.
2120 South 1300 East
Salt Lake City, Utah 84106

and depositing the same, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the ~~12th~~ 11th day of ~~September~~ October, 1984.

Patsy Wyatt

Subscribed and sworn to before me this 12th day of September, 1984.

Florence K. Dalton
Notary Public
Residing at Salt Lake City, Utah

My commission expires:

5/13/85

APPENDIX 3

ROBERT A. BURTON, #0516
STRONG & HANNI
Attorneys for Defendant
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

JAMES LEE SANDERS, et al.,
Plaintiffs,
vs.
KRISTIN S. AHLSTROM,
Defendant.

O R D E R

Civil No. C83-692

Honorable Leonard Russon

Plaintiff's Motion for New Trial or Modification of Verdict came on for hearing before the Honorable Leonard Russon, one of the judges of the above-entitled court, on October 15, 1984. Plaintiff was represented by his attorney, Samuel King, and defendant was represented by her attorney, Robert Burton. The court having reviewed the memoranda, listened to oral argument, being fully advised, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for New Trial or Modification of Verdict be and hereby is denied.

Dated this 22nd day of October, 1984.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk
By L Lundberg
Deputy Clerk

Leonard H Russon
Leonard Russon, Judge

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

PATSY WYATT, being duly sworn, says:

That she is employed in the offices of Strong & Hanni, Attorneys for Defendant herein; that she served the attached Order

upon Plaintiff's counsel

by placing a true and correct copy thereof in an envelope addressed to:

Samuel King
Attorney for Plaintiff
301 Gump & Ayers Building
2120 South 1300 East
Salt Lake City, Utah 84106

and depositing the same, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 17th day of October, 1984.

Patsy Wyatt

Subscribed and sworn to before me this 17th day of October, 1984.

Florence K. Hebda
Notary Public
Residing at Salt Lake City, Utah

My commission expires:
5/13/85

INSTRUCTION NO. 4

You are the exclusive judges of the credibility of the witnesses and the weight or convincing force of their testimony. In so judging, you can take into consideration any interest a witness may have in the lawsuit and any bias or probable motive, or lack thereof, to testify as they do, if any is shown. You may also consider the deportment of witnesses upon the witness stand, the reasonableness or lack thereof of their statements, their frankness or the want of it, their opportunity to know, their ability to understand, their capacity to remember, and whether any witness contradicted himself or herself, and then determine therefrom, in accordance with your honest convictions, what weight and credibility you should give to the testimony of each witness, measured by reason and common sense and the rules set forth in these instructions.

If you believe a witness has wilfully testified falsely to any material matter in this case, you may disregard the whole of the testimony of such witness except as you find it to have been corroborated by other credible evidence, in which event you should then give it the weight to which you find it is entitled.

INSTRUCTION NO. 6

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

APPENDIX 6

INSTRUCTION NO. 7

As jurors, it is your exclusive responsibility to determine the issues of fact in this case, and you are to decide those issues from the evidence received in the trial and not from speculation or conjecture.

The evidence to be considered by you includes the testimony of witnesses, exhibits received by the court, stipulations of the parties, if any, reasonable inferences to be drawn from facts proven in the case, presumptions, if any, as are stated in these instructions, and all of the facts and circumstances disclosed thereby.

If and where there is a conflict in the evidence, you should reconcile such conflict as far as you reasonably can; but where the conflict cannot be reconciled then, since you are the final judges of the facts and the credibility of the witnesses, you must resolve that conflict and determine from the evidence what you believe the true facts to be.

Statements of counsel made throught the trial are not evidence and should not be considered as such by you.

INSTRUCTION NO. 10

If you believe any witness or any party has wilfully testified falsely as to any material matter, you may disregard the entire testimony of such witness or party, except as he may have been corroborated by other credible evidence.